Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREGORY ARTHUR OTT,

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER 28 U.S.C. § 2244(d)(2), WHICH TOLLS THE LIMITATIONS PERIOD FOR FILING A FEDERAL HABEAS PETITION FOR "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW," INCLUDES THE NINETY DAYS IN WHICH A STATE HABEAS PETITIONER MAY FILE A PETITION FOR WRIT OF CERTIORARI IN THIS COURT?

WHETHER EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS IN 28 U.S.C. § 2244 MAY BE DENIED A STATE INMATE FOR WHOM TIMELY FILING OF THE PETITION IN FEDERAL COURT WAS RENDERED IMPOSSIBLE BY IRREGULAR STATE COURT NOTICE OF DECISION?

WHETHER BRIEFING OF ISSUES ON APPEAL PROVIDES SUFFICIENT NOTICE TO A CIRCUIT COURT FOR EXPANSION OF A CERTIFICATE OF APPEALABILITY?

INTERESTED PARTIES

1. Gregory Arthur Ott, Petitioner.

2. Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

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The opinion of the Fifth Circuit in this case, *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999) is contained at App. 1 et seq. The opinion denying rehearing is contained at App. 9.

JURISDICTION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 2254. This Court has certiorari jurisdiction under 28 U.S.C. § 1257 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(d)

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

State court. The limitation period shall run from the latest of – (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2253(c)(1)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas proceeding in which the detention complained of arises out of process issued by a State court. . . .

Rule 22, Federal Rules of Appellate Procedure

A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Rule 9, Rules Governing Section 2254 Cases in the United States District Courts

Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its

> filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

STATEMENT OF THE CASE

In March 1978, Ott was indicted in Denton County, Texas, for the offense of capital murder. The indictment alleged that on or about the 20th day of February 1978, Ott

> . . . did then and there knowingly and intentionally cause the death of an individual, Bobby Doherty, by shooting him with a gun, and the said Bobby Doherty was then and there a peace officer acting in the lawful discharge of an official duty, to wit: assisting in a Criminal Investigation, and the defendant knew the said Bobby Doherty was a peace officer.

In June 1978, a jury convicted Ott of the lesser included offense of murder and assessed his punishment at life. Ott's conviction was affirmed on direct appeal. *Ott v. State*, 627 S.W.2d 218 (Tex. App. – Fort Worth 1981, *pet. ref'd*).

In 1988, Ott filed a state petition for writ of habeas corpus pursuant to Article 11.07, Texas Code of Criminal Procedure, which contested the trial court's *sua sponte* inclusion in the judgment and sentence of an affirmative finding of the use of a deadly weapon. That writ was granted by the Texas Court of Criminal Appeals in an unpublished opinion on May 31, 1989. As a result of the

Court's holding, Ott's parole eligibility was no longer to be computed on the basis of flat time served, but also included consideration of good conduct time. On August 9, 1989, the Texas Board of Pardons and Paroles ("Board") found that Ott would be eligible for parole in February 1990.

On January 10, 1990, the Board recommended that Ott be granted parole pending further investigation. On January 12, 1990, notification was sent to the trial officials as per the then existing statutory scheme (i.e., notification to the District Attorney, Mr. Jerry Cobb, the Denton County Sheriff, Mr. Kirby Robinson, and the District Judge of the 158th Judicial District Court, the Honorable Philip Vick). The elected District Attorney, Mr. Jerry Cobb (who had also tried the case back in 1978), elected not to protest Ott's parole and did not file a protest within the time frame designated. Protests were also not timely submitted by either the Sheriff or the District Judge.

Accordingly, Ott received notification of the decision to parole him on January 31, 1990. The Board Minutes reflect that this decision was finalized from the Board's perspective and a parole certificate was issued on February 16, 1990. On Thursday, February 22, 1990, Ott learned that he was to be transferred the following day to the Walls Unit of the Texas Department of Corrections in Huntsville for release on Monday, February 26, 1990, at 9:00 am. On Friday, February 23, Ott was transferred to the Walls Unit as scheduled for release the following Monday, February 26, 1990. On Saturday, February 24, 1990, the warden advised Ott that his parole had been rescinded by the Board. The Board Minutes reflect that Ott's parole certificate was voided on February 23, 1990.

The Board Minutes also reflect that an entirely different panel from the panel which approved the parole was the panel that rescinded and revoked the parole.

Ott has been diligent in seeking parole since 1990, and has been unable to gain any relief despite having the support of the District Attorney who presided at his trial, Jerry Cobb, and having passed a polygraph administered by Ernie Hulsey that strongly supports the conclusion that he is actually innocent of intentionally and knowingly causing the death of Ranger Bobby Doherty.

After February 11, 1992,[1] Ott participated as a class member in a suit, originally filed in the Western District federal court in Austin on February 26, 1985, that challenged the Board's use of protest letters in making its parole decisions. A bench trial was held in that court on June 9-12 and 23-26, 1992, and July 16, 1992. The class action resulted in two memorandum opinions by Magistrate Judge Stephen H. Cappelle on November 1 and December 1, 1995, holding that the Board's statutory scheme, allowing it to receive and consider protest statements without disclosure of their existence, source, or contents to the potential parolee, violated the inmates' equal protection rights. *See Johnson v. Texas Department of Criminal Justice*, 910 F. Supp. 1208 (W.D. Tex. 1995) (hereinafter *Johnson I*). On April 30, 1996, Magistrate Cappelle issued another memorandum opinion awarding the plaintiffs' attorneys fees, expenses and costs, and post-

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[1] On this date, Magistrate Judge Stephen H. Cappelle designated the class as all present and future inmates of the Texas Department of Criminal Justice – Institutional Division. *Johnson v. Rodriguez*, 110 F.3d 299, 302 (1997).

judgment interest. *See Johnson v. Rodriguez*, 110 F.3d 299, 302-03 (5th Cir. April 23, 1997), *cert. denied*, 118 S. Ct. 559 (1997). The magistrate's judgment on the merits and award of fees were appealed to the Fifth Circuit Court of Appeals.

During the time *Johnson* was pending in the federal courts, Ott did not file a successor petition in state court for three reasons: (1) he was diligently continuing to seek relief from the Texas Board of Pardons and Paroles while *Johnson* was pending; (2) he reasonably was abating his pursuit of state post-conviction relief until the Fifth Circuit ruled on the suit in which he was a class member, so as to avoid being accused of forum-shopping or losing his parole claims to the Texas Court of Criminal Appeals' abstention and court-generated abuse of the writ doctrines;[2] and (3) he waited for the Fifth Circuit's ruling so as not to waste the federal courts' time with immature or frivolous claims.

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[2] Under the abstention doctrine, which is based upon the principle of comity between the state and federal courts, the Texas Court of Criminal Appeals refuses to take any action on claims pending in the federal courts. *See Ex parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977) (citing *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972)). Had Ott submitted a state application for writ of habeas corpus, the Texas Court of Criminal Appeals would have refused to take action on his parole claims because they were before the Fifth Circuit, requiring him to present them again in a *third* state petition, which almost certainly would have been denied merits review on the ground of abuse of the writ. *See Ex parte Barbour*, 879 S.W.2d 889 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1084 (1995).

In February 1997, when the class action had remained with the Fifth Circuit to the point that it appeared Ott had no option but to make an application to the state courts, the undersigned informed Ott of the fact that there was a forthcoming deadline if he wanted to preserve his right to proceed into federal court. In a letter dated March 22, 1997, Ott authorized the undersigned to proceed so that a state court writ could be filed before April 24, 1997, the termination date of the federal court "grace period" for persons in Ott's procedural stance. *Davis v. Johnson*, 158 F.3d 806, 810 n.5 (5th Cir. 1998) (applying *Flores, infra*, to 28 U.S.C. § 2254 petitions); *United States v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998) (adopting one-year grace period for 28 U.S.C. § 2255 motions).

Ott filed his second application for a state writ of habeas corpus on April 23, 1997, pursuant to Article 11.07, Texas Code of Criminal Procedure.[3] Under the

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[3] Ott raised the following Claims for Relief, which were filed again in the federal district court:

1) Ott was denied his right to equal protection, as guaranteed by the Fourteenth Amendment, due to the Texas Board of Pardons and Paroles' reliance on secret and unverified written and oral protests.

2) The Warden of the Walls Unit of the Texas Department of Criminal Justice, Institutional Division, abrogated Ott's rights to equal protection, as guaranteed by the Fourteenth Amendment, because, acting on behalf of the State of Texas, the Warden selected Ott for differing treatment without a rational basis.

3) Ott's rights to due process, as guaranteed by the Fourteenth Amendment, were abrogated by the Texas Board of Pardons and Paroles' issuance of a parole

same statute the State had fifteen days to answer the application. TEX. CODE CRIM. PROC. ART. 11.07, § 3(b) (1997). No answer was filed by the State, no evidentiary hearing was held, and no findings of fact or conclusions of law were entered by the State District Court. Rather, Ott's state habeas petition was merely sent to the Texas Court of Criminal Appeals. When the undersigned learned of the transmittal of the habeas petition to the Court of Criminal Appeals, a pre-submission brief was filed with that Court pointing out that an evidentiary hearing was necessary due to the allegations in the petition.

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certificate and its subsequent recision of that certificate without notice or a hearing.

4) The prosecutor's actions in reviewing Ott's note pad and refusing to return it to trial counsel, compounded by the trial court's failure to return the note pad to Ott's counsel, violated Ott's rights to present a defense and to testify in his own defense, as said rights are guaranteed by the Sixth and Fourteenth Amendments.

5) The prosecutor's actions in reviewing Ott's note pad and refusing to return it to trial counsel, compounded by the trial court's failure to return the note pad to Ott's counsel, operated to deprive Ott of his right to effective assistance of counsel, as said right is guaranteed by the Sixth and Fourteenth Amendments.

6) The trial court committed reversible error by discharging at least thirty-two veniremen from jury service without the defendant being present, in violation of Ott's rights under the Sixth Amendment.

7) Ott was denied his right to effective assistance of counsel, as said right is guaranteed by the Sixth and Fourteenth Amendments.

The only communication from the Court of Criminal Appeals regarding Ott's writ after the filing of the pre-submission brief was a "white card" sent to Ott and the undersigned counsel. These "white cards," postmarked September 18, 1997, stated only that on September 17, 1997, "the Court ha[d] denied without written order the application for writ of habeas corpus."[4]

The Court of Criminal Appeals' order was dated September 17, 1997 (Wednesday). It was postmarked September 18, 1997 (Thursday), and it was not received by the undersigned until Saturday, September 20, 1997. On Monday, September 22, 1997, the undersigned counsel filed a motion for reconsideration in the Court of Criminal Appeals and simultaneously mailed by overnight service provider (Federal Express) Ott's first (and only) federal writ from counsel's office in Austin to the United States District Court, Southern District, Houston Division, where it was filed on Tuesday, September 23, 1997. The petition was transferred by the Southern District to

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[4] Despite the absence of anything more than the above language, it is clear that the Court of Criminal Appeals could not have based its decision on procedural default because the factual basis for Ott's first six state writ claims (first three federal writ claims) arose after he had presented his only other application for state habeas relief. TEX. CODE CRIM. PROC. ART. 11.07 § 4(a)(1) (1997). The factual basis for Ott's due process, due course of law, and equal protection claims regarding his treatment in the Texas parole system did not arise until February 23, 1990. Additionally, Ott's state claims having to do with the prosecutor's expropriation of the notes he made during trial should have met the requirement of Article 11.07, Section 4(a)(2) that, but for the violations of the constitution alleged, no rational juror would have convicted Ott of murder.

the Eastern District by an order dated September 30, 1997. The Eastern District, Sherman Division, issued an order to show cause on October 24, 1997, recognizing that Ott has raised "one or more factual allegations which, if true, state a cause of action under 28 U.S.C. § 2254."

On January 29, 1998, after receiving two unopposed extensions of time to file a response, Appellee Johnson filed a motion to dismiss based upon the statute of limitations in 28 U.S.C § 2244(d) (1998). The case was assigned by the District Court to a United States Magistrate Judge. The Magistrate Judge issued his Report and Recommendation on March 27, 1998, recommending that Ott's petition be dismissed as beyond the period of limitations. Ott and Appellee Johnson filed Objections to the Magistrate Judge's Report and Recommendation on April 28, 1998, and May 6, 1998, respectively.

The District Court issued a final order and judgment on August 31, 1998, adopting as correct the findings of fact and conclusions of law of the magistrate judge and entering judgment in accordance, dismissing Ott's petition. Ott filed a timely notice of appeal and applied to the District Court for a Certificate of Appealability, raising nine issues.[5] The District Court granted a Certificate of

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[5] The issues were as follows:

1. Ott presented a timely first federal habeas petition because the tolled period included the time Ott was allotted to file for writ of certiorari.

2. Ott presented a timely first federal habeas petition because he met the requirements of 28 U.S.C. § 2244(d) as applied through Rule 6, Federal Rules of Civil Procedure.

Appealability on the issues regarding the limitations period and equitable tolling. App. 3 (Slip Op. at 3).

On appeal to the Fifth Circuit, Ott abandoned his argument that the mail provision in Rule 6(e), Federal Rules of Civil Procedure, extended the limitations period. In addition to the issues granted COA by the District Court, Ott briefed the remaining six issues. 192 F.3d at 512 n.6. The Fifth Circuit panel issued an opinion on October 21, 1999, holding (1) "the period for seeking a petition for certiorari does not toll Ott's limitations period under § 2244(d)(2)"; and (2) equitable tolling was not warranted. App. 6, 8 (Slip Op. at 7, 9). The panel also found that, because Ott had not made "an express request to broaden the COA," it would not consider the other six

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3. Even if the petitioner did not file within the statute of limitations, the statute should be equitably tolled so that the district court can reach the merits of his claims.

4. Denial of review of Ott's first federal habeas corpus petition would violate the Suspension Clause.

5. Denial of review of Ott's first federal habeas corpus petition violates the Due Process Clause.

6. Denial of review of Ott's first federal habeas corpus petition violates the Equal Protection Clause.

7. Denial of review based on the statute of limitations, without any notice, violates the Suspension Clause.

8. Denial of review based on the statute of limitations, without any notice, is repugnant to due process.

9. Denial of review based on the statute of limitations, without any notice, is repugnant to equal protection.

issues for which COA was denied by the District Court. 192 F.3d at 512 n.6. Ott's timely filed motion for panel rehearing was denied without written opinion. App. 9.

By refusing to grant equitable tolling for circumstances that were outside of Petitioner Ott's control, the Fifth Circuit Court of Appeals has denied him merits review of very weighty constitutional issues. Ott has been forced to languish in prison for a decade past his original release date due solely to capricious and arbitrary actions of Texas officials that violated Ott's rights to equal protection and fundamental fairness. The Fifth Circuit's treatment of the issues creates issues of nationwide importance to all current and future habeas applicants.

Indeed, the record reflects that, during that decade, Ott did not "sit on his rights" but diligently sought release from his unjust captivity through Texas parole procedures and a class action suit in federal court. Ott filed his state petition for writ of habeas corpus on the same day that the opinion in the federal suit finally was issued. Ott's attempts through the parole system, the state courts, and the federal class action suit afforded him no relief. His hope of redress for his unjust incarceration has come to lie solely with the instant federal petition brought under 28 U.S.C. § 2254. The lower federal courts, however, have allowed Ott's **ten-year** unjust incarceration to stand by penalizing him for filing his federal petition a **few days** after the limitations period in 28 U.S.C. § 2244 expired – a matter over which he had virtually no control.

If this Court does not grant review of Ott's petition for writ of certiorari, a miscarriage of justice will be allowed to stand.

ARGUMENT

1. **The Fifth Circuit has decided an important question of federal law that has not been, but should be decided by this Court, in finding that 28 U.S.C. § 2244(d)(2) does not include the 90 days in which a state habeas petitioner may file a petition for writ of certiorari to this Court.**

28 U.S.C. § 2244 (d)(2) tolls the statute of limitations during the time when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." Such State post-conviction review should include the ninety days in which a Supreme Court certiorari petition may be filed from the State court decision.

a. **The Fifth Circuit's holding that a petition for writ of certiorari to this Court is not an application for "State" review that would toll the § 2244 limitations period is contrary to the rules of statutory construction as developed by this Court.**

The Fifth Circuit, in the opinion below, finds that, supposedly "unlike § 2244(d)(1)(A), which takes into account the time for filing a certiorari petition in determining the finality of a conviction on direct review, § 2244(d)(2) contains no such provision." App. 5 (Slip Op.

at 6). Section 2244, in fact, contains no explicit reference to petitions for certiorari to this Court. The circuit panel, nevertheless, proceeds to contrast its judicial interpretation of § 2244(d)(1)(A) with § 2244(d)(2) as though it were comparing the words of the statute in each subsection under a rule of statutory construction. *Id.* This leads ultimately to the Court's holding that a petition for writ of certiorari to this Court "is not an application for **'State'** review that would toll the limitations period." *Id.* (citing *Hohn v. United States*, 118 S. Ct. 1969 (1998), for the principle of statutory construction, and *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999); *United States v. DeTella*, 6 F. Supp. 2d 780 (N.D. Ill. 1998) (holding that the time for seeking certiorari with this Court does not toll the limitations period under § 2244(d)(2)).

By the very same rule of statutory construction, however, the Fifth Circuit's restrictive interpretation of § 2244(d)(2) may be shown to be contrary to Congressional intent. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The non-opt-in provision's tolling period, applicable in Ott's case, includes the "time during which a properly filed application for state post-conviction ***or other collateral review*** . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). The opt-in provision, in contrast, terminates its analogous tolling period for state post-conviction relief upon "the final ***State court disposition*** of such petition." 28 U.S.C. § 2263 (b)(2) (emphasis added). "Given the opt-in provision's clear exclusion of

federal (*i.e.*, Supreme Court) *certiorari* review from the tolling period, the omission of similar language from the non-opt-in provision indicates that Congress did not intend to impose a similar limitation on the non-opt-in tolling mechanism." JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1b (1999). As surely as Section 2244(d)(1)(A), Section 2244(d)(2) embraces non-"State" review, e.g., a petition for writ of certiorari to this Court.

b. Judicial interpretation is required, absent clear statutory language or Congressional intent, to find that the 90-day period for filing a certiorari petition to this Court tolls the statute on either direct or collateral review.

It is now undisputed in the lower federal courts that the statute of limitations in § 2244(d) is tolled for the 90-day period in which a state inmate *could* apply for writ of certiorari to this Court on "direct review." *See Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998); *Smith v. Bowersox*, 159 F.3d 345 (8th Cir. 1998); *Albert v. Strack*, 1998 U.S. Dist. LEXIS 129 at *13 (S.D.N.Y. Jan. 13, 1998). The language of the statute does not compel the courts' finding that "direct review" includes federal certiorari review. Rather, this finding is a logically necessary interpretation enabling the statute to function. Without it, the period in which a case might be on certiorari review could wipe out the statutory limitations period.[6] *In Albert*, the U.S.

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[6] § 2244(d)(1)(A) does not state that the limitations period is tolled until "the expiration of the time for seeking [certiorari] review." Quite to the contrary, the statutory language "such

District Court for the Southern District of New York elucidated this situation:

> The plain language of 28 U.S.C. § 2244(d)(1)(A) refers to the expiration of the time for "direct review," and it is indisputable that direct review includes review by certiorari to the United States Supreme Court. Logically, under the Respondent's reading, the one-year statute of limitations clock would apparently begin running even if the Supreme Court granted certiorari, unless the Respondent would wrench the statutory language even further to consider Supreme Court review as "collateral" for tolling purposes under § 2244(d)(2).

Albert, supra, at *13.

The courts must only assume that certiorari review is within the purview of § 2244, for either direct or collateral purposes. It does not follow, therefore, that the statutory language construed by the Fifth Circuit to drive a wedge between direct and collateral application is controlling on the issue whether the period must be tolled

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review" refers immediately to "direct review." "Direct review" remains undefined in the statute. The statute does not address the inclusion of certiorari review, or application to the Supreme Court for certiorari review. States are not constitutionally required to have any direct review process. They are not obligated to have mandatory direct review of even capital cases. Non-capital cases are subject only to discretionary review in most, if not all, states. Certiorari to the U.S. Supreme Court can be waived in all circumstances. The language of the statute does not compel the conclusion that Congress meant for "expiration of time" to include the time for possible application for certiorari review.

for the time that a petitioner *could* apply for post-conviction certiorari review. App. 6 (Slip Op. at 6) (holding that "State" modifies "other collateral review"). The Congressional restriction that tolling applies for "properly filed" post-conviction petitions only means that the statute will continue to run after the conclusion of direct review when a petitioner's pending post-conviction filing(s) have not comported with procedural requirements of time, place, or manner. *Hughes v. Irvin*, 967 F. Supp. 775, 778 (E.D. N.Y. 1997) (holding that "properly filed" in § 2244(d)(2) means that "in order to trigger the tolling mechanism, a petitioner's collateral review application must be submitted in accordance with any applicable procedural requirements, such as notice to the respondent, correct place of filing, and timeliness of the motion"). The "properly filed" terminology distinguishes post-conviction collateral review from direct review only because direct review is in fact required in essentially every jurisdiction. Nothing in the statute leads to the conclusion that, once a state collateral petition has been "properly filed" and ruled upon by the highest state court, the limitations period may not also be considered tolled during the 90 days allotted by Supreme Court Rule 13.

c. Interpretative consistency should require that the time during which "other collateral review . . . is pending" include the limited period (90 days under Supreme Court Rule 13) when a petitioner could seek a writ of certiorari from a state post-conviction judgment.

For equitable reasons, the term "properly filed" in 28 U.S.C. § 2244(d)(2) should not exclude consideration of

time in which a pleading could be filed, such as a certiorari petition to this Court. Given that statutes of limitation should be interpreted so as not arbitrarily to cut off a petitioner's opportunity to seek habeas relief in the federal courts, once it is determined that the time allotted for seeking certiorari review applies to § 2244(d)(1)(A), it is arbitrary to refuse to find the same in regard to § 2244(d)(2).

Although a state habeas petitioner need not file a petition for writ of certiorari in order to exhaust State remedies, this Court's certiorari review is an aspect of the State post-conviction process. *See* LIEBMAN & HERTZ, *supra*, at § 6.4 (1994) (section on U.S. Supreme Court certiorari review in chapter on "State Postconviction Remedies"); *contra* App. 6 (Slip Op. at 6). Courts have found, in the context of § 2244(d)(2), that a certiorari petition to this Court, once filed, tolls the statute of limitations. *E.g.*, *United States v. DeTella*, 6 F. Supp. 2d 780, 782 (N.D. Ill. 1998) (holding that because petitioner "did not actually file a petition for certiorari with the Supreme Court, his post-conviction was no longer 'pending' for the purposes of § 2244(d)(2)").[7]

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[7] The district court in *DeTella* also held, ambiguously, that under 28 U.S.C. § 2244(d)(2), the statute of limitations is tolled only when a petition is "pending," and interpreted "pending" to mean "while review of [the] denial [of a state post-conviction petition] is pending before a state court." *DeTella*, 6 F. Supp. 2d at 782. The bottom line of the Court's interpretation seems to be that, for it, "pending" means that a petition is actually on file either in the state post-conviction system or on writ for certiorari to this Court. The same court found no cases directly discussing the meaning of "pending" as it is used in § 2244(d)(2). *Id.* at 782.

When Congress elects to use terminology that has become commonplace in court decisions in a particular field of law, the rules of statutory construction call for defining the statute's terms in accordance with that accepted judicial meaning. LIEBMAN & HERTZ, *supra*, at § 5.1b (citing *Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992)). This Court routinely uses the word "pending" to refer to the time for filing of a petition for writ of certiorari. *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, Circuit Justice) (granting application for stay of mandate "pending the filing and disposition of a petition for certiorari"); *Williams v. Missouri*, 463 U.S. 1301, 1301 (1983) (Blackmun, Circuit Justice) (movant seeking "stay of execution pending timely filing and disposition" of certiorari petition on direct review); *White v. Florida*, 458 U.S. 1301, 1301 (1982) (Powell, Circuit Justice) (movant seeking to stay mandate "pending filing and disposition of his petition for a writ of certiorari"); *Baldwin v. Maggio*, 715 F.2d 152 (5th Cir. 1983) (determining whether to stay own mandate "pending" the filing of a writ of certiorari); *Smith v. Balkom*, 677 F.2d 20, 21 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982) (same).

A number of federal district courts have held that "pending" must include the time in which a petitioner **could seek** appeals from a post-conviction decision within the State system. The logic of these opinions must also apply to the petition for writ of certiorari at the end of the State collateral review process. *Neal v. Ahitow*, 8 F. Supp. 2d 1117, 1119 (C.D. Ill. 1998) (quoting and relying, in part, on *Deerwester v. Carter*, No. 97-CV-1428 (C.D. Ill. May, 20, 1998)). These courts determine that Congress'

use of "pending" not only is ***ambiguous***, but also must not be restricted to mean only the period of time that a state application is before a state court. In *Neal*, the Court observed:

> [I]f Congress intended . . . it may have stated . . . that the time period that the State provides for post-conviction review shall not be counted toward any period of limitation. But Congress did not do so. Rather, section 2244(d)(2) requires that the petition for post-conviction relief be properly filed and pending before the limitations period will be tolled. Once a state trial court dismisses a post-conviction relief petition, how can it be said that the petition is filed? Even more troublesome, how can it be said that the petition is pending?

Neal, 8 F. Supp. 2d at 1118-19. The *Neal* Court noted the *Deerwester* Court's findings that "pending" is ambiguous, because "[i]t is not always used in the most technical sense to describe a matter that is before a court awaiting action." *Id.* (quoting *Deerwester*, 97-CV-1428, Doc. #18 at p. 4-5). The *Deerwester* Court observed that Black's Law Dictionary defines "pending" as "awaiting an occurrence or conclusion of an action," and states that "an action or suit is 'pending' from its inception until the rendition of final judgment." *Id.* (quoting *Deerwester*, citing BLACK'S LAW DICTIONARY, 6TH ED., p. 1134 (1990)). The *Deerwester* Court added that "pending" included the period of time following a final judgment during which there might be possibility of appeal. *Id.* (quoting *Deerwester*, citing *United States v. Owen*, 20 C.M.R. 182 (1955)). On the basis of these findings, the *Deerwester* Court held that an action was pending "until a final judgment is rendered and appeal or

reconsideration is no longer an option." *Id.* (quoting *Deerwester*).

The *Neal* Court adopted the *Deerwester* Court's holding, because "any other reading of the section" would leave § 2254 petitioners in a Catch-22 situation:

> [A] post-conviction petition is properly considered "pending" while review of its denial is pending before a state court. Otherwise, a "Catch-22" situation could arise where an inmate would be forced either to allow the statute of limitations to expire, which would prevent habeas relief, or to file his habeas petition before exhausting his state court remedies, which would result in the dismissal of his habeas petition as premature for failure to exhaust state remedies.

Id. (quoting *Gonzalez v. Detella*, 918 F. Supp. 1214 (N.D. Ill. 1998)). The *Neal* Court expressed concern over the consistency of its opinion with Congress' intent to expedite the habeas process, but found the alternative confusion and denial of access to habeas petitioners more unacceptable. *Id.*

Interpretative consistency would require that the time during which "other collateral review . . . is pending" include the limited period (90 days under Supreme Court Rule 13) when a petitioner could seek a writ of certiorari from a state post-conviction judgment. Given the fact that "pending," when applied to petitions for certiorari, may refer to the time for filing as well as the actual filing of a petition, sections 2244(d)(1)(A) (direct review) and 2244(d)(2) (collateral review) are clearly parallel, not contrasting on the issue of actual filing. The

language of the statute most easily lends itself to the interpretation that "properly filed" modifies an application for State post-conviction review, not other collateral review. The statute, very pointedly, does **not read** "the time during which **properly filed application[s]** . . . ***[are] pending,***" nor "the time during which a properly filed state post-conviction application or properly filed application for other collateral review is pending." If Congress had intended to embrace within the tolling statute only those state appeals from post-conviction judgments or Supreme Court certiorari petitions that were actually filed, it would have referred to "application[s]" in the plural or repeated "properly filed."

"Pending" embraces the period of collateral review allowed within the state system, and must also embrace the period allowed by Supreme Court Rule 13 to apply for certiorari review. Otherwise, "pending" would be arbitrarily subject to two different interpretations, allowing for tolling on the state level, as per *Neal* and *Deerwester, supra,* for the period of time an appeal might be taken from a trial court post-conviction judgment, while prohibiting tolling on the Supreme Court certiorari level. The language of the statute and history of usage of the term "pending" as relating to Supreme Court certiorari review permits tolling for the period of time allotted in Supreme Court Rule 13.[8]

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[8] Respondent Johnson did not raise his statute of limitations defense with "clean hands." Rather, he obtained two unopposed extensions of time before filing his Answer, allowing the 90 day period for filing a petition for writ of certiorari to expire before objecting on the grounds that "pending" should refer only to filed petitions. This was after Ott

2. The Fifth Circuit's decision is inconsistent with its own authority and other circuits' "equitable tolling" decisions in holding that failure to file within the limitations period was attributable to the petitioner when, but for a Court's irregular procedure, filing would have been timely.

Equitable tolling should be available to Ott, because the Court of Criminal Appeals' "white card" order was an event beyond his control which caused him to have to file a late federal petition. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *Calderon v. Beeler*, 128 F.3d 1283, 1289 (9th Cir.), *cert. denied*, 118 S. Ct. 1389 (1998); *Davis v. Johnson*, 158 F.3d 806, 811-12 (5th Cir. 1998); *United States v. Williams*, 1998 U.S. Dist. LEXIS 15766 (N.D. Ill. Sept. 23, 1998); *Parker v. Bowersox*, 975 F. Supp. 1251 (W.D. Mo. 1997). No case for equitable tolling will be exactly like another. The case law, however, reflects a general principle: that state action delaying the filing of a petition should not be allowed to diminish time in the petitioner's limitations period. *Prunty*, 187 F.3d at 1107. In *Williams*, delay by the federal judge in granting an in forma pauperis petition was not allowed to prevent federal review. *Williams*, 1998 U.S. Dist. LEXIS 15766, at *4-*5. In *Parker*,

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had made it clear that he knew he could toll the statute by actually filing an application for writ of certiorari, but chose not to so as to avoid needlessly creating additional work for this Court since certiorari from the Court of Criminal Appeals' "white card" denial would undoubtedly be a needless consumption of this Court's resources. Moreover, it would be inequitable and burdensome on the system to require petitioners to actually file petitions for writ of certiorari merely to preserve their right to file a federal petition for writ of habeas corpus.

the mail-box rule of *Houston v. Lack*, 487 U.S. 266 (1988), was applied to the limitation statute, allowing equitable tolling when a *pro se* petitioner timely submitted his application for mailing by prison authorities, who then kept his mail from being processed until the deadline of the "grace period." *Parker*, 975 F. Supp. at 1253 (holding that "something outside" the prisoner's "control" kept his mail from being processed until April 24, when he otherwise would have had his petition at the court before the April 23 deadline); *accord Prunty, supra.*

The "white card" order caused the statute to run before Ott received, or could have received without extraordinary effort, **any notice** that his case was no longer lodged in the Court of Criminal Appeals. *See* 28 U.S.C. § 2244(d)(2). Under normal circumstances not involving a "white card" order, Ott would not have faced any possible forfeiture of federal habeas review, because the case would have been filed and set for submission in the Court of Criminal Appeals, giving him the right to file a motion for rehearing in state court. TEX. R. APP. PROC. 213(b) (1997) (TEX. R. APP. PROC. 79.2(d) (1998)). The "white card" denial not only took Ott by unfair surprise, but prevented him from having the right to move for rehearing under state law so as to preserve his opportunity for federal review. Ott filed a motion for rehearing anyway on September 22nd, invoking the Court of Criminal Appeals' ability to reconsider the decision on its own motion. *Id.* (providing that no motions for rehearing or reconsideration will be considered from denial of relief if the case was not docketed, but that the court can reconsider its decision on its own motion). Ott's motion for

rehearing was rejected by the Court of Criminal Appeals as unauthorized on the following day, September 23rd.

One of the basic questions involved in equitable tolling is whether the petitioner "slept on his rights." *Perez v. United States*, 167 F.2d 913, 917-18 (5th Cir. 1999) (quoting *Burnett v. New York*, 380 U.S. 424, 429 (1965)). This Court has observed that a petitioner does not sleep on his rights when he brings an action within the period of the statute of limitations. *Burnett*, 380 U.S. at 429. The limitation period is then tolled until a state court order dismissing the state action becomes final. *Id.* at 435. However long Ott's claims may have been presentable, he did not sleep on his rights, but filed his state action within the one-year limitations period. When Ott's state action was denied, he did not sleep on his rights, but filed his federal petition on the second business day after the state court notified him of its decision. *See Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (holding that, because the petitioner "does not explain the six-month delay between being notified about his state application and filing his federal petition, . . . his circumstance is not extraordinary enough to qualify for equitable tolling"). Had Ott successfully filed his federal petition the day after the Court of Criminal Appeals issued its "white card" denial, he would have been afforded federal review. When Ott actually received notice that his state petition was denied, he very expediently transmitted his federal writ on the first business day after having received notice, with the petition being filed on the second business day after notice. Since the method by which the state court disposed of Ott's claims was unusual, Ott's diligent post-notice response should allow equitable tolling.

Sleeping on one's rights differs from dilatory filing under Rule 9 (a), Rules Governing Section 2254 Cases in the United States District Courts. A petitioner does not sleep on his rights when his counsel files his state petition within time to toll the statute of limitations. *Burnett, supra.* Arguably, he does not sleep on his rights when counsel federal expresses the federal petition for filing **immediately** upon learning of the state court's action. The Fifth Circuit's focus on the amount of time that passed prior to Ott's filing of his second state post-conviction petition, which might assist a Rule 9 analysis, is irrelevant to equitable tolling.[9] App. at 8 (Slip Op. at 8). All that matters for equitable tolling purposes, as opposed to a Rule 9 analysis, is that Ott filed his state petition before the federal statute of limitations period had run. Once that was accomplished, the question became whether Ott slept on his rights in filing the federal petition after receiving notice of denial in the state action. *Coleman, supra.* Ott very promptly filed the federal petition. The Fifth Circuit would now penalize Ott for filing, by the broadest interpretation in favor of Respondent, a federal petition **four days late**, while another panel of the same circuit court granted equitable tolling in a case in which a petitioner's counsel's **unreasonable** reliance upon a court, in part, and his own gross negligence, caused him to file the federal petition over a year after the limitations period had run. *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998).

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[9] It is also inaccurate, charging that Ott failed to challenge parole board actions until 15 years after the conviction became final. App. 8 (Slip Op. at 8).

Although circumstances relevant to equitable tolling vary from case to case, the Fifth Circuit's treatment of Ott cannot be squared with its treatment in *Davis*. *Davis* is a death penalty case, but Ott's claims to deprivation of equal protection and due process causing him to remain unjustly incarcerated for almost a decade (at this point) are serious and compelling. Ott's substantive claims, furthermore, are equally if not more compelling than Davis', and Ott has received **no meaningful review** of those claims in state or federal court.

3. By denying Ott review of six claims that were not granted Certificate of Appealability by the District Court, but which were briefed in the appellate brief, the Fifth Circuit entered a decision in conflict with other Circuit courts.

Following Rule 22, Federal Rules of Appellate Procedure, the circuit courts have recognized a constructive request for COA where the district court has refused to certify all of the issues the petitioner has presented for collateral review. *E.g.*, *United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). Some circuit courts consistently apply this rule to appeals in which the district court granted COA for some, but not all, issues, if the appellant has made "at least an implicit request for review by briefing the issues denied certification." *Kimler*, 150 F.3d at 431 & 431 n.1 (citing *Kincade v. Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997); *United States v. Smith*, 1997 WL 542293 (9th Cir. 1997) (unpublished opinion)); *see also Green v. United States*, 172 F.3d 53, 1998 WL 879513, at **1 n.1 (7th Cir. 1998) (unpublished disposition).

The Fifth Circuit procedures for expanding COA are unclear. There are no written rules concerning such expansion. The relevant opinions, however, suggest that the Appellant must make some kind of formal request regarding each issue sought to be included. App. 4 (Slip Op. at 4-5 n.6) (citing *Kimler*).

The district court granted COA "limited to petitioner's **claim** regarding limitations and equitable tolling." Certificate as to Appealability, October 12, 1998 (emphasis added). Ott had raised nine issues in his Motion for Certificate of Appealability, all of which pertained to the limitations bar raised by the district court. The district court's language in its COA order easily could have been construed as treating all the issues as Ott's "claim." The district court's Order, by omitting to refer explicitly to the excluded issues, was ambiguous in itself.

The additional issues to which the Fifth Circuit refers in footnote 6 initially were raised by Ott in response to the district court's order dismissing Ott's petition as outside the statute of limitations in 28 U.S.C. § 2244(d). *See* Response To This Court's Order of January 30, 1998, And Respondent's Motion To Dismiss, filed in the district court on February 24, 1998. The Magistrate (in his Findings, Conclusions, and Recommendation) and the district court (in its subsequent Order) simply ignored these six points. The seriousness of these unaddressed issues, which challenge the denial of federal review of Ott's first petition as violating the Suspension Clause, due process, and equal protection (*see* footnote 5, *supra*), certainly is

enhanced by the outrageous violations of equal protection and due process in Ott's underlying claims pertaining to the parole process.

Out of excess of caution, Ott noted in his original appeal brief to the Fifth Circuit that the issues had been raised by him, but had not been addressed by the district court. Brief of Appellant at 28. Ott then briefed the issues on appeal. This should have been sufficient notice to the Court of Appeals that Ott wanted those issues considered. In light of (1) the vagueness of the district court's order on the extent of its COA grant and (2) the lack of any clear circuit guidelines for expanding issues beyond those granted COA by the district court, the Court of Appeals should have reviewed the issues in fairness to Ott.

This Court should grant review on this question, so as to assure consistency among the circuits and lack of confusion for petitioners who, in circumstances like those of Ott, wish to avail themselves of their statutory and rule based right to seek COA from the circuit court. 28 U.S.C. § 2253(c); FED. R. APP. PROC. 22.

CONCLUSION

The petition for writ of certiorari should be granted to address these issues of nationwide significance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41211

GREGORY ARTHUR OTT,

Petitioner-Appellant,

versus

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

(Filed Oct. 21, 1999)

Before POLITZ, DAVIS, and STEWART, Circuit Judges.

POLITZ, Circuit Judge:

Texas inmate Gregory Arthur Ott appeals the district court's denial of his habeas corpus petition under 28 U.S.C. § 2254. For the reasons assigned, we affirm.

BACKGROUND

In 1978, Ott was convicted of murdering a Texas Ranger and was sentenced to life imprisonment. This conviction was affirmed on direct appeal and became

final in July 1982.[1] On April 23, 1997, Ott, represented by counsel, filed a state habeas corpus application, challenging issues relating to the rescission of his parole certificate and the validity of his conviction.[2] On September 17, 1997, the Texas Court of Criminal Appeals denied the application without written order.

On Tuesday, September 23, 1997, Ott, represented by counsel, filed a § 2254 petition raising the same issues as in the state habeas application. Counsel stated that on the prior Saturday, September 20, 1997, he received a "white card" from the Texas Court of Criminal Appeals postmarked September 18, 1997, noting that Ott's habeas application had been denied. Counsel stated that he mailed the § 2254 application for filing on Monday, September 22, 1997, the next business day after receiving notification.

Adopting a report and recommendation by the magistrate judge, the district court found that Ott had until April 24, 1997 to timely file a § 2254 application and that the filing of the state court action on April 23, 1997 tolled the period for one day. The court determined that the filing on September 23, 1997, after the denial of the state application on September 17, 1997, was untimely. It also rejected Ott's argument that the limitations period should

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[1] *See* ***Ott v. State***, 627 S.W. 2d 218 (Tex. App. 1981, pet. ref'd).

[2] The April 1997 habeas petition was actually the second state habeas application. The first state habeas action was filed in 1989. That habeas petition, which raised different issues from the present petition, is not in the record and is not relevant to the disposition of this case.

be tolled during the time allotted to seek a petition for certiorari from the denial of his state habeas application. Finally, the district court determined that equitable tolling should not apply in this case as Ott had waited nineteen years before bringing his claims.

After dismissing his petition as time-barred, the district court granted a certificate of appealability ("COA") limited to the issues regarding the limitations period and equitable tolling.

ANALYSIS

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), there is a one-year limitations period for filing a writ of habeas corpus by a person in state custody. Under 28 U.S.C. § 2244(d)(1)(A), the limitations period commences from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[3] Moreover, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

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[3] Although § 2244(d)(1) lists three other alternative events from which the limitations period would begin, Ott agrees that the date of final judgment in § 2244(d)(1)(A) is the only applicable provision here.

For convictions final before the effective date of the AEDPA, we have applied a one-year grace period allowing habeas petitioners until April 24, 1997 to file their claims.[4] As noted, however, under § 2244(d)(2) the time between Ott's filing of his state habeas application and its denial does not count against the one-year limitations period.

Ott filed his state habeas application on April 23, 1997, one day before the expiration of the grace period. The limitations period expired on Friday, September 19, 1997, one day after the Texas Court of Criminal Appeals denied the habeas application on September 18, 1997.[5] Ott asserts two bases that would prevent his September 23, 1997 application from being deemed untimely filed. First, he contends that the ninety days in which a state habeas petitioner may petition the United States Supreme Court for a writ of certiorari, even if no petition for certiorari is filed, should toll the limitations period. Second, he asserts that the limitations period in this case should be extended by the doctrine of equitable tolling.[6]

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[4] **Flanagan v. Johnson**, 154 F.3d 196 (5th Cir. 1998).

[5] On appeal, Ott abandons the argument made in the district court that the three-day allowance for acts conducted by mail, *see* Fed. R. Civ. P. 6(e), extended the limitations period.

[6] We note that although Ott has briefed six issues concerning the suspension, equal protection, and due process clauses of the constitution, these issues were not included in the COA granted by the district court. Even though Ott has briefed the issues, he has not explicitly requested that we broaden the district court's COA. Without an express request to broaden the COA, one which we approved, we will not consider issues on which a COA was denied. *See* ***United States v. Kimler***, 150 F.3d 429 (5th Cir. 1998).

I

Ott first contends that § 2244(d)(2), which tolls the limitations period while a "properly filed application for State post-conviction or other collateral review" is pending, includes the ninety days in which a state habeas petitioner may file a petition for writ of certiorari with the United States Supreme Court. He maintains that expiration of the limitations period prior to the time in which he could seek Supreme Court review would unfairly penalize those who desire to petition for certiorari. We review this question of statutory construction *de novo*.[7]

We have not previously had an opportunity to consider this issue. We now reject same. We agree with our colleagues in the Tenth Circuit that § 2244(d)(2) does not toll the limitations period from the time of denial of state habeas relief by the state high court until the time in which a petitioner could have petitioned the United States Supreme Court for certiorari.[8]

First, unlike § 2244(d)(1)(A), which takes into account the time for filing a certiorari petition in determining the finality of a conviction on direct review, § 2244(d)(2) contains no such provision. Rather, § 2244(d)(2) only tolls the period for a properly filed petition for "State post-conviction or other collateral review." It is a fundamental tenet of statutory construction that Congress intended to

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[7] *See* ***United States v. Fitch***, 137 F.3d 277 (5th Cir. 1998).

[8] *See* ***Rhine v. Boone***, No. 98-6353, 1999 WL 459312, at * 2-3 (10th Cir. July 7, 1999). *See also* ***United States v. DeTella***, 6 F. Supp. 2d 780 (N.D. Ill. 1998) (holding that time for seeking certiorari with Supreme Court does not toll limitations period under § 2244(d)(2)).

exclude language included in one section of a statute, but omitted from another section.[9] We conclude and hold that a petition for writ of certiorari to the Supreme Court is not an application for "State" review that would toll the limitations period.[10]

Second, we also note that judicial efficiency does not require a petitioner to begin federal habeas proceedings until the state conviction becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the period for seeking certiorari. For state post-conviction proceedings, however, the post-conviction application becomes final after a decision by the state's high court. Requesting relief from the Supreme Court is not necessary for prosecuting state habeas relief and is irrelevant to federal habeas jurisdiction. Thus, unlike direct review, there is no judicial interest in habeas proceedings for tolling the limitations period for Supreme Court certiorari petitions.[11] Accordingly, the period for seeking a petition for certiorari does not toll Ott's limitations period under § 2244(d)(2).

II

Ott next maintains that the doctrine of equitable tolling should extend the limitations period. We have held that the AEDPA's limitations period is not jurisdictional,

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[9] **Hohn v. United States**, 118 S. Ct. 1969 (1998).

[10] *See* ***Rhine***, 1999 WL 459312, at * 3 (holding that "State" modifies both the phrase "post-conviction review" and the phrase "other collateral review").

[11] *See* ***id.***

but is subject to equitable tolling principles.[12] We review the district court's decision not to invoke the doctrine of equitable tolling for abuse of discretion.[13]

Although cautious not to apply the statute of limitations too harshly, we recognize that the equitable tolling doctrine is to be applied only if the relevant facts present sufficiently "rare and exceptional circumstances" that would warrant application of the doctrine.[14] We recently explained that equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights," and noted that "excusable neglect" does not support equitable tolling.[15]

Ott contends that it would be inequitable to apply the limitations period because he mailed his federal habeas petition for filing on the first business day after receiving notice of the denial of the state application. Moreover, Ott asserts that Texas created an impediment to the timely filing of his petition by its notification of habeas denials through mailed postcards.

We find no error in the district court's decision not to apply the doctrine of equitable tolling to the facts of this case. Ott was represented by counsel for both his state

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[12] **Davis v. Johnson**, 158 F.3d 806 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1474 (1999).

[13] **Fisher v. Johnson**, 174 F.3d 710 (5th Cir. 1999).

[14] **Davis**, 158 F. 3d at 811.

[15] **Coleman v. Johnson**, No. 98-10394, 1999 WL 598607, at * 4 (5th Cir. Aug. 3, 1999) (quoting **Rashidi v. America President Lines**, 96 F.3d 124, 128 (5th Cir. 1996)).

and federal habeas applications. As the district court noted, Ott did not challenge the parole board's actions until some nineteen years after the underlying conviction and fifteen years after the conviction became final. Further, we underscore that the state habeas application was not filed until one day before the expiration of the AEDPA's one-year grace period, an action that necessarily mandated a swift filing of the federal habeas application following the denial of the state petition. This was a matter totally within the control of Ott. The state application readily could have been filed a few days earlier, allowing an adequate period for the filing of the federal petition after final denial of the state application. Accordingly, we find that these are not "rare and exceptional" circumstances in which equitable tolling is warranted.

Because Ott's federal habeas corpus petition was not timely filed and because equitable tolling does not apply in this case, the judgment appealed is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41211

GREGORY OTT

Petitioner – Appellant

v.

GARY L JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellee

Appeal from the United States District Court
for the Eastern District of Texas, Sherman

ON PETITION FOR REHEARING

(Filed Dec. 3, 1999)

Before POLITZ, DAVIS and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge